RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,

v.

ROYAL DUTCH SHELL PETROLEUM CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PROFESSOR JUAN E. MÉNDEZ U.N. SPECIAL RAPPORTEUR ON TORTURE AS *AMICUS CURIAE* ON REARGUMENT IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Juan E. Méndez is the United Nations Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 16/23.[1]

This submission is drafted on a voluntary basis to the Supreme Court of the United States in the rehearing of *Kiobel, et al. v. Royal Dutch Petroleum, et al.*, for the Court's consideration without prejudice, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Pursuant to U.N. Human Rights Council 16/23 (A/HRC/RES/16/23), Méndez acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine and act on information from numerous sources, including individuals, regarding is-

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[1] Counsel of record for all parties have consented to the filing of this amicus curiae brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amicus or his counsel made a monetary contribution to this brief's preparation or submission.

sues and alleged cases concerning torture and or other cruel, inhuman or degrading treatment or punishment.

Méndez was Co-Chair of the Human Rights Institute of the International Bar Association, London in 2010 and 2011; and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague from mid-2009 to late 2010. Until May 2009, Méndez was the President of the International Center for Transitional Justice (ICTJ). Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003 Méndez was a member of the Inter-American Commission on Human Rights of the Organization of American States, and served as its President in 2002.

Méndez teaches human rights at American University/Washington College of Law and at Oxford University (U.K.). In the past, he has taught at Notre Dame Law School (USA), Georgetown and Johns Hopkins. He worked for Human Rights Watch (1982-1996) and directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999).

SUMMARY OF ARGUMENT

Universal jurisdiction permits nation States to take jurisdiction over serious violations of international human rights law, regardless of where the violation occurred and regardless of the nationality of the victim or the perpetrator. When the national courts of a State provide a remedy for an egregious human rights abuse, they act as agents of the international

community to enforce rights that are owed to all people. Numerous international treaties provide for universal jurisdiction over grave offenses, and some treaties permit States to provide *civil* remedies to victims of extraterritorial violations.

I. The Convention Against Torture ("CAT") is one such treaty that permits States to provide access to civil remedies for victims of torture, regardless of where the torture occurred or the perpetrator's nationality. The prohibition against torture is absolute and enjoys the highest status within international law. As such, all States have a legal interest in preventing and remedying breaches of this norm, no matter where they occur.

In particular, Article 14 of the CAT establishes that all State Parties—including the United States—shall "ensure in [their] legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible," regardless of where the act occurred. The Committee against Torture has confirmed on multiple occasions that a State Party's obligations to provide redress and rehabilitation extend to victims of extraterritorial torture.

II. Numerous States fulfill their international legal obligations by providing civil and/or criminal remedies for extraterritorial human rights violations. States effectively "translate" their international obligations into domestic provisions that accord with the structure, procedure and traditions of their legal systems. While domestic provisions may

vary, they all rely on the principle that each State must hold perpetrators accountable and must ensure that victims' right to an effective remedy is respected.

State practice reflects a full spectrum of extraterritorial remedies. The United States, and an increasing number of other countries, grant civil jurisdiction to human rights victims to pursue damages against foreign abusers for acts that occurred outside national territory. A significant number of other States permit universal criminal jurisdiction over egregious human rights abuses and also permit the victims to join an *action civile* for monetary and other relief to the criminal proceedings. Additionally, some States permit civil remedies for extraterritorial human rights violations where no other competent foreign court is available to adjudicate the dispute. Various national courts require of the perpetrator a minimal territorial presence, while still others permit suits *in absentia*. While the precise requirements may vary, State practice shows a consistent and committed effort to ensure that no abuse goes without remedy and that no victim is deprived of justice and reparation.

In sum, international law, the practice of States that implement it, and their obligations to provide effective redress under binding treaties, all lead to the conclusion that the United States is consistent with international law and practice in providing extraterritorial jurisdiction for plaintiffs to seek civil remedies under the Alien Tort Statute.

ARGUMENT

I. STATES ARE PERMITTED TO PURSUE CIVIL REMEDIES EXTRATERRITORIALLY FOR VIOLATIONS OF PEREMPTORY NORMS OF INTERNATIONAL LAW.

A. International law permits States to provide civil remedies extraterritorially for human rights violations.

1. The international community recognizes the permissibility of universal jurisdiction.

The principle of universal jurisdiction permits States, through their domestic courts, to investigate, prosecute, and punish certain crimes under international law that are universally condemned (*i.e.*, *erga omnes* crimes), including—but not limited to—torture, terrorism, piracy, slavery, war crimes, crimes against humanity and acts of genocide, that have occurred extraterritorially, irrespective of the nationality or location of the victims or perpetrators, or where the crime occurred.[2] While this pure form of universal jurisdiction is well established as a matter of international law, its use is relatively uncommon. States tend to apply extraterritorial

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[2] *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States (*hereinafter*, Restatement Third) § 404 ("certain offenses [are] recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism"); Luc Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (2003); Stephen Macedo, ed., *National Courts and the Prosecution of Serious Crimes Under International Law* (2006).

jurisdiction where it is reasonable to do so. Restatement (Third) of Foreign Relations Law of the United States (*hereinafter*, Restatement Third) § 403; *see also* Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 143-44 (2006). Thus, some colorable basis to exercise personal jurisdiction over either the perpetrators or victims will generally be sought whenever possible.

The application of extraterritorial jurisdiction absent any nexus to either the perpetrator or the victim may also be justified on protective grounds, *i.e.*, where the crimes are committed against or threaten the national interests of the State, construed in terms of its obligations *erga omnes*. This form of jurisdiction is well-accepted. Insofar as violations of *jus cogens* norms give rise to obligations *erga omnes*, they constitute a crime against or threaten the interests of *all* States, and all States have a legal interest in the protection of the underlying rights.[3] Accordingly, States

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[3] Restatement Third § 702 cmt. (o); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("a central feature of the modern law of international human rights is that violations taking place in the territory of foreign sovereigns are now subject to international scrutiny and may give rise to obligations upon which all States may or even must act"). *See also*, *Prosecutor v. Furundzija*, Case No. IT-95-17-1-T (Judgment, Int'l Crim. Trib. for the Former Yugoslavia (ICTY) 10 December 1998) at ¶ 151, confirmed on appeal, (21 July 2000), *available at* http://www.icty.org/case/furundzija/4. *See also*, *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, Judgment, I.C.J. Reports, 1970, 3, at ¶ 32; *Case Concerning East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at ¶ 29); *Case Concerning Application of the Convention on the Prevention*

may exercise extraterritorial jurisdiction in the pursuit of remedies for their violation. Restatement Third § 703 cmt. (b); *Prosecutor v. Furundzija*, Case No. IT-95-17-1-T (Judgment. Int'l Crim. Trib. for the Former Yugoslavia (ICTY) 10 December 1998) *at* ¶ 156 (No. IT-95-17/1-T) Dec 10 1998.

The related rule, *aut dedere aut judicare* (extradite or prosecute), stems from the principle that States may not shield a person suspected of certain categories of crimes from prosecution, and that they have an obligation to prosecute or facilitate the extradition of a perpetrator found within their territory to a country or tribunal willing or able to prosecute.[4] In exercising universal jurisdiction, national courts act as agents of the international community to enforce international law. The Supreme Court of Israel elucidated this point in the *Eichmann* case:

> Not only do all the crimes attributed to the appellant bear an international character, but

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and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996, 595, at ¶ 31.

[4] M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* 3-5 (1995), and M. Cherif Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework," in M. Cherif Bassiouni, ed., *International Criminal Law* 3, 5 (2nd. ed. 1999); International Law Commission, *Preliminary report on the obligation to extradite or prosecute* (aut dedere aut judicare), UN Doc. A/CN.4/571, (7 June 2006), ¶ 31; ILC, Second Report on the Obligation to Extradite or Prosecute (*Aut Dedere aut Judicare*), UN Doc. A/CN.4/585 General Assembly, 11 June 2007 ¶ 9.

> their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.

Attorney-General of Israel v. Eichmann, 36 Int'l L. Rep. 277, 304 (Israel Sup. Ct. 1962).

Numerous international treaties and agreements provide the basis for extraterritorial jurisdiction with respect to serious violations of *jus cogens* international law norms, as affirmed by various courts and tribunals. The most explicit are the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (*hereinafter*, Torture Convention or CAT), art. 5, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 112 (*entered into force for the* United States, Nov. 20, 1994); all four of the 1949 Geneva Conventions: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), art. 50, Aug. 12, 1949, 6 U.S.T. 321, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention

IV), art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*all entered into force for* the United States Aug. 2, 1955);[5] and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (*entered into force for the* United States, Feb. 23, 1989).

For example, the International Court of Justice (ICJ) held that "the rights and obligations enshrined by the [Genocide Convention] are rights and obligations *erga omnes*" and "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), ¶ 31 (July 11, 1996), *available at* http://www.icj-cij.org/docket/files/91/7349.pdf. The ICJ applied similar logic in "The Wall Case" regarding Israel's construction of a wall in the Palestinian Territory. The ICJ found that Israel's violations of its *erga omnes* obligations "to respect the right of the Palestinian people to self-determination" and towards "certain of its obligations under international humanitarian law" were "the concern of all States." *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, ¶ 155 (July 9, 2004),

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[5] Each of the four Geneva Conventions include an article requiring States Parties to enact domestic legislation to punish grave breaches of the Conventions, to search for alleged perpetrators, and to "bring such persons, regardless of their nationality, before [their] own courts."

available at http://www.icj-cij.org/docket/files/131/1671.pdf. With respect to the rules of humanitarian law, the ICJ emphasized that "every State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with." *Id.* at ¶ 158.

Other international agreements provide extraterritorial jurisdiction for additional offenses, including, *e.g.*, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, T.I.A.S. 7192 (1971), Article 4; the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 U.S.T. 565, 974 U.N.T.S. 177 (1973), Article 5; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 28 U.S.T. 1975, T.I.A.S. 8532, 1035 U.N.T.S. 167 (1977), Article 3; the International Convention against the Taking of Hostages, 1316 U.N.T.S. 205, T.I.A.S. No. 11,081 (1985), Article 5; the International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1997), Article 6; and the International Convention on the Suppression and Punishment of the Crime of Apartheid, Arts. 4 and 5, U.N. Doc. A/2645 (1976).

Accordingly, extraterritorial jurisdiction is not merely theoretically permissible. To the contrary, it is a prevalent feature of human rights and humanitarian treaty law and jurisprudence.

2. <u>The well-accepted rationale for exercising extraterritorial jurisdiction to impose criminal penalties also justifies the provision of civil remedies</u>.

Among the rationales for extraterritorial jurisdiction are the condemnation and redress of certain categories of heinous conduct, the need to end impunity for those crimes, and the universal protection of human rights. *See, e.g., Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); Restatement Third, *supra*, § 404; Donovan & Roberts, *supra*, at 142-143. Because these objectives may be realized through civil remedies as well as (and in some cases better than) through criminal penalties, the practice of universal civil jurisdiction by many States has developed significantly. Donovan & Roberts, *supra*, at 153.

Indeed, certain treaties explicitly call for extraterritorial *civil* remedies, including notably the Convention against Torture, Article 14(1). One of the most recent human rights instruments, the International Convention for the Protection of All Persons from Enforced Disappearance (CED),[6] illustrates this modern jurisdictional trend for serious international law violations. Article 24(4) of the CED specifically requires State Parties to ensure that their legal systems provide victims with "the right to obtain reparation and prompt, fair and adequate compensation."[7]

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[6] International Convention for the Protection of All Persons from Enforced Disappearance (CED), art. 9, U.N. Doc. A/61/488, *entered into force* 23 December 2010. Although the United States has not signed the CED, it does not object to this provision. *See, Note verbale dated 20 June 2006 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Human Rights Council*, U.N. Doc. A/HRC/1/G/1 (27 June 2006), *available at* http://www.state.gov/documents/ organization/124147.pdf.

[7] *Id.*, Art. 24(5).

Indeed, under United States law, universal jurisdiction is not limited to criminal law; it also applies to civil harms. *See, e.g., Filártiga*, 630 F.2d 876; *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995). *See also, Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 106 (2d Cir. 2000). According to the Restatement Third, while

> jurisdiction on the basis of universal interests has been exercised in the form of criminal law, [. . .] international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.

Restatement Third, *supra*, § 404, at cmt (b).

As such, there is growing recognition that the same rationale for exercising criminal universal jurisdiction justifies the application of *civil* remedies for extraterritorial violations as well. *See, e.g.*, Donovan & Roberts, *supra*, at 153.

3. Victims of human rights abuses, including torture, have a right under international law to an effective remedy and to reparation, including access to a court or an impartial proceeding.

The principle of *ubi jus ibi remedium*—"where there is a right, there is a remedy"—is a well-established principle of international law.[8] Nearly every

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[8] The leading formulation of this principle comes from the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case: "[I]t is a principle of international law,

major human rights treaty includes a provision establishing an individual right to an effective remedy. [9] States are obligated to prevent torture, to bring it to an end, and not to endorse, adopt or recognize acts that breach the prohibition.[10] Torture victims must be ensured an effective remedy, including access to a

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and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation.*" *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added).

[9] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) at art. 8; International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 2(3), 9(5), 14(6), 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967); Convention on Elimination of All Forms of Racial Discrimination, art. 6, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, art. 2(c), Dec. 18, 1979, S. Exec. Doc. R, 96-2 (1980), 1249 U.N.T.S. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. at arts. 13 & 14; Int'l Comm'n of Jurists, Written Statement to Ad-Hoc Committee on Disability Rights Convention, *Need for an Effective Domestic Remedy in the Disability Rights Convention*, Jan. 2005 ("The right to an effective remedy is so firmly enshrined . . . that any credible modern human rights treaty has to incorporate it.").

[10] *See, e.g.*, Prosecutor v. Furundzija, Judgment of the Trial Court, *supra* note 3, at ¶ 145 ("[A]ll States parties to the relevant treaties [regarding torture] have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish[.]"). Numerous ICTY judgments support this finding. *See also*, *Al-Adsani v. The United Kingdom*, ¶ 60, App. No. 35763/97, Council of Europe, European Court of Human Rights, 21 November 2001, *available at* http://www.unhcr.org/refworld/docid/3fe6c7b54.html.

court or impartial proceeding, and full and adequate reparation.

When it comes to securing an "effective remedy" for international crimes, criminal prosecution and civil reparations are two sides of the same coin. The Rome Statute of the International Criminal Court (ICC) not only provides for the criminal prosecution of fundamental human rights abuses such as genocide, crimes against humanity, and war crimes; it also establishes principles related to the restitution of victims. Further, the Rome Statute permits the ICC to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[11] Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Rules of Procedure and Evidence permit victims to bring an action in national court to obtain compensation, "pursuant to the relevant national legislation," for crimes that have been adjudicated by the ICTY. ICTY Rules of Procedure and Evidence, art. 106(B), IT/32/Rev. 46 (20 October 2011) *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf.

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[11] UN General Assembly, Rome Statute of the International Criminal Court (last amended January 2002), art. 75(2), 17 July 1998, A/CONF. 183/9, *available at* http://www.unhcr.org/refworld/docid/3ae6b3a84.html. *See also*, Rules of Procedure and Evidence of the International Criminal Court, arts. 94-99, ICCASP/1/3 (2002), *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_ Evidence_English.pdf.

Furthermore, certain international instruments call for State Parties to provide *both* civil *and* criminal remedies for violations of fundamental rights. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law (U.N. Basic Principles) note that victims must have "equal access to an effective judicial remedy as provided for under international law." UN Basic Principles (Van Boven-Bassiouni Principles), U.N. Doc. A/RES/60/147 (21 March 2006), Principle 12, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement. On the criminal side, the Basic Principles place a duty on States to investigate, prosecute, and punish gross violations of international human rights law and serious violations of international humanitarian law constituting international crimes. *Id.*, Principle 4. Accordingly, States shall incorporate or otherwise implement appropriate provisions for universal jurisdiction within their domestic law where provided by treaty or other international obligations. *Id.*, Principle 5.

At the same time, the Principles also state that victims of such crimes have a right under international law to adequate, effective and prompt reparation for harm suffered. The Principles recognize that full and effective reparations take varied forms, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *Id.*, Principles 19-23. Moreover, States must provide access to relevant information concerning violations and reparation. *Id.*, Principle 24.

Similarly, the U.N. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity calls upon States to adopt domestic legislation to enable national courts to exercise universal jurisdiction over serious crimes under international law, or apply the principle of *aut dedere aut judicare*. U.N. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 21, Measures for strengthening the effectiveness of international legal principles concerning universal and international jurisdiction, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement.

The Updated Principles also highlight victims' right to reparation, which includes measures of restitution, compensation, rehabilitation and satisfaction. *Id.*, Principle 34.

B. The Convention against Torture expressly calls for extraterritorial jurisdiction over civil claims.

The United States is party to the Convention against Torture, one of the few human rights treaties it has ratified. In accordance with Article 14, each State Party to the CAT must "ensure in its legal system that the victim of an act of torture obtains redress and has an *enforceable* right to fair and adequate compensation including the means for as full rehabilitation as possible." CAT, *supra*, art. 14 (emphasis added). Article 14 is victim oriented—it applies to all victims of torture without discrimination of any kind, and without geographic limita-

tion. Draft General Comment: Working Document on Article 14 for Comments, Committee against Torture, 46th Session, 9 May-3 June 2011, ¶¶ 1, 20.[12] As such, its scope is even broader than other human rights treaties proscribing torture.

The "ordinary meaning" of Article 14, considered in light of the CAT's "object and purpose"[13] calls for States to provide a mechanism for redress and restitution within their domestic legal systems for acts of torture wherever they occur.[14] The

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[12] General Comments are non-binding but authoritative interpretive statements of the U.N. treaty bodies, which give rise to normative consensus on the meaning and scope of particular rights contained in the treaty. See Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Center for Human Rights and Global Justice Working Paper No. 17 (2008), *available at:* www.chrgj.org.

[13] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), *available at:* http://www.unhcr.org/refworld/docid/3ae6b3a10.html.

[14] According to the U.N. Committee Against Torture, "the term 'redress' in Article 14 encompasses the concepts of 'reparation' and 'effective remedy'. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention." Committee against Torture, Working Document on Article 14 for Comment (Draft) (hereinafter, "Draft Gen. Comment on Art. 14"), ¶ 2, 46th Session, May 9 – June 3, 2011, *available at:* www2.ohchr.org/english/bodies/cat/comments_article14.htm. *See also*, Christopher Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18(5) EJIL 921, 923-26 (2007).

CAT's purpose necessitates States apply the Convention extraterritorially in order to be effective, unless the terms expressly limit application to within the State's territorial jurisdiction. Christopher Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18(5) EJIL 921, 923-27 (2007) (demonstrating that the Convention was designed with unlimited geographical scope, except where specific provisions *expressly* limit the scope of a State Party's responsibility). Several articles of the CAT do expressly limit their application to within the State's borders, supporting the conclusion that, when not so stated, other articles apply extraterritorially. *See, e.g.*, CAT, *supra*, arts. 2(1), 5(1)(a), 11-13, 16(1), & 20(1). *See also*, Hall, *supra*, at 924.

Early texts in the Convention's preparatory work contained no mention of restricting the Convention's application to the territorial jurisdiction of State Parties. A territorial nexus that was added to an initial draft of Article 14 was later removed from the final text before its submission to the General Assembly for adoption in 1984, without objections from States regarding the content or application of Article 14. *See* Hall, *supra*, at 932-33; *see also* Jayne Huckerby & Sir Nigel Rodley, "Outlawing Torture: The Story of Amnesty International's Efforts to Shape the U.N. Convention against Torture," in Deena R. Hurwitz, Margaret L. Satterthwaite, Doug Ford, eds., *Human Rights Advocacy Stories*, 28-31 (2009).

1. The Committee against Torture has affirmed that, under Article 14, State Parties are to provide remedies for extraterritorial acts of torture, an interpretation that is both authoritative and reasonable.

The Committee against Torture (the Committee), charged with issuing authoritative interpretations of CAT, has established that Article 14 calls on State Parties to provide domestic civil remedies for extraterritorial acts of torture, regardless of who committed the act. In 2011, the Committee stated its position that States should provide remedies to victims who were harmed extraterritorially:

> The Committee considers that *obligations of States parties under article 14 are not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party.* The Committee has praised the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise his or her rights guaranteed under Article 14 in the territory where the violation took place. *Indeed, article 14 requires States to ensure that all victims of torture are able to access remedy and obtain redress.*

Draft Gen. Comment on Art. 14, ¶ 20, (emphasis added).

The Committee has repeatedly expressed this same interpretation in its Conclusions and Recommendations on Country Reports. For example, following Canada's dismissal of *Bouzari v. Islamic Republic of Iran* (case against a foreign State for acts of torture committed within that State's territory), the Committee noted "its concern at . . . the absence of effective measures to provide civil compensation to victims of torture in all cases," recommending that Canada "should review its position under Article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture." Committee against Torture, Conclusions and recommendations of the Committee against Torture, Canada, CAT/C/ CR/34/CAN, at ¶¶ 4(g), 5(f) (7 July 2005), *available at* http://tb.ohchr.org/default.aspx?Symbol=CAT/C/CR/ 34/CAN. In its most recent Concluding Observations on Canada, the Committee reinforced this view, asserting once again that "[t]he State party should ensure that all victims of torture are able to access remedy and obtain redress, *wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim.*" Committee against Torture, 48th session, 7 May to 1 June 2012, Consideration of reports submitted by States parties under article 19 of the Convention, Advance Unedited Version, Concluding observations of the Committee against Torture, Canada, ¶ 15, *available at* http://ccla.org/wordpress/wp-content/uploads/2012/06/UNCAT-concluding-observations.pdf.

2. The United States' current legislation and policy recognizes that extraterritorial jurisdiction over civil remedies is permissible under international law.

The U.S. signed the CAT in 1988. However, prior to submitting the treaty to the Senate for its advice and consent to ratify, President Reagan recommended attaching an "understanding" declaring "that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." 136 CONG. REC. S17,486, S 17, 492 (daily ed. Oct. 27, 1990), *reprinted in* Contemporary Practice of the United States, 85 AJIL 335, 337 (1991); *see also*, Hall, *supra*, at 934, n.53. He asserted that the omission of this jurisdictional nexus was a simple drafting error. Summary and Analysis of the Convention, in Message from the President of the United States transmitting the Convention against Torture and Inhuman Treatment or Punishment [sic], 20 May 1988, 100th Congress, 2nd Sess., Treaty Doc. 100-20 (1988), at 13, *available at:* http://www.presidency.ucsb.edu/ws/?pid=35858#axzz1xUh9YTEZ. *See also*, Hall, *supra*, at 934.

The President's "understanding" was misconceived on several grounds. First, this very limited view of the CAT was intentionally rejected by its drafters. J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 92, 99-107, 146-147 (1988). *See also*, Hall, *supra*, at

935 (recognizing Burgers & Danelius as the "most authoritative history" of the treaty drafting). Second, and more importantly, it fundamentally misunderstands how the Treaty's obligations with respect to criminal jurisdiction are implemented under domestic law. Indeed, criminal jurisdiction permits related civil claims in many countries, through an *action civile* or an *actio popularis*. As such, extraterritorial jurisdiction for civil claims is not only non-controversial in numerous States; it is indeed already practiced by them. Hall, *supra*, at 934, n.55.

However, when the Convention was ultimately ratified in 1994, Congress included President Reagan's understanding.[15] Sweden entered an express objec-

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[15] *See* United Nations Treaty Collections (UNTC) Database, Database regarding the status of the Convention against Torture, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#top, in relevant part:

> II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:
>
> [. . .]
>
> (3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

See also, Initial Report of the United States to the Committee against Torture due in 1995, U.N. Doc. CAT/C/28/Add.5 (9 February 2000) ¶ 268, *available at:* http://www.state.gov/documents/organization/100296.pdf.

tion,[16] and Germany submitted a more muted communication, rather than a formal objection.[17]

After granting advice and consent to ratification of the Convention, Congress passed the Torture Victim Protection Act (TVPA) in 1991, Pub. L. 105-256, 12 March 1992, 106 Stat. 73 (28 U.S.C. § 1350 note), which explicitly recognizes that the United States has a duty to assert extraterritorial jurisdiction for torture.[18] The passing of the TVPA is significant for several reasons. First, it demonstrates that Congress has *at least* on one occasion addressed the issue of civil remedies for extraterritorial human rights violations. And, it chose to *affirm* the permissibility of

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[16] See UNTC Database, *supra*, note 15, Objection of Sweden, 27 February 1996 ("It is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfil the obligations undertaken therein.").

[17] See UNTC Database, *supra*, note 15, endnote 23 ("On 26 February 1996, the Government of Germany notified the Secretary-General that with respect to the reservations under I (1) and understandings under II (2) and (3) made by the United States of America upon ratification "it is the understanding of the Government of the Federal Republic of Germany that [the said reservations and understandings] do not touch upon the obligations of the United States of America as State Party to the Convention.").

[18] The TVPA provides a civil remedy to victims of torture occurring outside the territorial jurisdiction of the United States, "carr[ying] out the intent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." S. REP. 102-249, 3, as reprinted in 1991 WL 258662 (Nov. 26, 1991).

extraterritorial jurisdiction under United States law. The extensive legislative history surrounding the TVPA's enactment showcases this intent, specifically noting that the TVPA "provid[es] a civil cause of action in U.S. courts *for torture committed abroad.*" S. REP. 102-249 *as reprinted in* 1991 WL 258662 (Nov. 26, 1991), p 3-4 (emphasis added). The Senate Report on the need for the legislation concluded that the TVPA's extraterritorial application was permissible under international law.

> Furthermore, legislation allowing for the civil suits against torture occurring abroad is by no means unknown. States have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad. Several states have established that the international law of human rights can be enforced on behalf of individuals in their courts. *See, Memorandum for the United States as Amicus Curiae,* Filártiga v. Peña-Irala, *reprinted in* 19 I.L.M. 585, 602-03 (1980) (citing cases from the Constitutional Court of Germany, the Supreme Court of the Philippines, and the Court of First Instance of Courtrai (Belgium)). In addition, according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over "offenses of universal interest."

Id. at 5 (*c.f.*, Restatement Third, *supra*, § 404). Far from overhauling or replacing the long-standing principles of extraterritorial jurisdiction embodied in the Alien Tort Statute and its jurisprudence, Congress

chose with the TVPA to expand on the ATS in a limited way. S. REP. 102-249, 4, (*citing* Filártiga *with approval*).

Second, and relatedly, in enacting the TVPA, Congress once again signaled its view that extraterritorial jurisdiction is permissible under international law. Not only the ATS and the TVPA, but also the domestic implementing legislation for both the CAT and the Genocide Convention[19] signify Congress' view that federal courts may apply extraterritorial jurisdiction for certain heinous crimes of international law.

This Court, moreover, has affirmed this view that U.S. courts may apply extraterritorial jurisdiction over certain violations—including torture—that have a special status in international law, both as a matter of custom and as a matter of treaty law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). As Justice Stephen Breyer wrote in his concurring opinion, "[t]oday international law will sometimes . . . reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior." *Id., at* 762. This is particularly so with the prohibition of torture,[20] which remains the only

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[19] Foreign Affairs Reform and Restructuring Act of 1998 Sec. 2242, 8 C.F.R. § 208.18 (requiring heads of state agencies to prescribe regulations for implementing United States obligations under the CAT), Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (signed 1988, making genocide a federal offense).

[20] *See, e.g., Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 106 (2d Cir. 2000):

human rights violation that gives rise to the obligation to investigate, prosecute and punish even an isolated act, whether or not it also constitutes a crime against humanity because it is part of a pattern of widespread or systematic violations.

To be sure, U.S. courts have not embraced "pure" universal jurisdiction over such violations. They have at their disposal prudential doctrines that can keep in check the use of the ATS and the TVPA for frivolous or unnecessary cases. *See*, Brief of *Amici Curiae* Professors of Civil Procedure and Federal Courts On Reargument in Support of Petitioners (No. 10-1491) (*filed* June 13, 2012).

II. NUMEROUS STATES PROVIDE CIVIL AND/OR CRIMINAL REMEDIES FOR EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS

While international criminal courts play an increasing role in bringing to justice high-level perpetrators of international human rights violations,

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> The new formulations of the [TVPA] convey the message that torture committed under color of law of a foreign nation in violation of international law is our business, as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses provide[s] scant comfort to the numerous victims of gross violations if they are without a forum to remedy the wrong. This passage supports plaintiffs' contention that in passing the [TVPA], Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts.

efforts to hold perpetrators accountable still occur primarily within the domestic legal system. To this end, the exercise of criminal jurisdiction over extra-territorial violations of well-established human rights norms is widespread. According to a 2011 Amnesty International report, 75% of United Nations member States allow for criminal prosecution for one or more of the following claims: war crimes, crimes against humanity, genocide, and torture. Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* 1 (2011), *available at* http://www.amnesty.org/en/library/info/IOR53/004/2011/en.

A. Criminal jurisdiction is the analogue in many countries that do not have civil jurisdiction for injury to person and property.

States fulfill their international human rights obligations in accordance with the structure, procedure, and traditions of their domestic legal systems. These procedures reflect the "translation" into domestic law of corresponding international law mandates. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L.1, 3 (2002).

In this country, of course, the modern application of the Alien Tort Statute, beginning with *Filártiga v. Peña-Irala*, has established civil remedies for international human rights violations. While other States may not have similar jurisprudence, many provide comparable remedies for the same types of violations. The core doctrine of these cases, whether civil

or criminal, relies on the principle that any nation can and should hold accountable those who abuse internationally protected human rights. As international law scholar Beth Stephens has noted, while such efforts in other systems may be restricted to criminal prosecution, procedural and cultural characteristics of the U.S. legal system have led U.S. human rights lawyers and advocates to translate these concepts into civil litigation.[21]

Furthermore, both the history and underlying aims of extraterritorial jurisdiction demonstrate that a rigid distinction between civil and criminal remedies is unfounded:

> [C]riminal and administrative proceedings and civil suits based on domestic tort claims respond to the same international law concerns as [Alien Tort Statute] lawsuits. These similarities are overlooked both within the United States and abroad, leading to the mistaken belief that we are engaged in significant-

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[21] Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L.1, 4-5,7, n.15 (2002) (*citing Filártiga*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes, summary execution, torture), *cert. denied*, 518 U.S. 1005 (1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture), *cert. denied*, 519 U.S. 830 (1996); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (summary execution), *cert. denied*, 508 U.S. 972 (1993); *Xuncax v. Gramajo*, 886 F. Supp.162 (D. Mass. 1995) (summary execution, torture, disappearance, cruel, inhuman or degrading treatment); *Forti v. Suarez-Mason*, 694 F.Supp. 707 (N.D. Cal. 1988) (summary execution, torture, disappearance)).

> ly different legal enterprises. To the contrary, each of these procedures reflects the "translation" into domestic law of identical international law mandates.

Id. at 3.

In his concurring opinion in *Sosa*, Justice Breyer noted that the procedural consensus in favor of universal jurisdiction for "a limited set of norms is consistent with principles of international comity." *Sosa*, 542 U.S. at 762. Since many nations combine civil and criminal proceedings, he reasoned, universal civil jurisdiction "would be no more threatening" than universal criminal jurisdiction. *Id.*

B. Many civil law countries incorporate civil damages claims into criminal proceedings initiated by victims or organizations representing victims.

Many States assert criminal jurisdiction over human rights abuses. Quite a few allow for incorporation of civil damages claims into criminal proceedings, making compensatory relief a possible domestic remedy for victims of serious human rights abuses. A large number of civil law countries require their courts to allow civil claims along with criminal claims initiated by either a victim or an organization representing victims. Hall, *supra*, 934, n. 55. Examples of States that allow for such actions, known as *action civiles* or *actio popularis*, are abundant.

Many of these countries also assert jurisdiction for criminal prosecution over select human rights abuses, such as torture, genocide, war crimes, and crimes

against humanity. This combination effectively allows victims of these abuses to seek monetary damages from their abusers. Countries asserting jurisdiction for criminal prosecution of human rights abuses committed extraterritorially while simultaneously allowing victims to attach civil claims for damages to criminal proceedings include: **Argentina**, art. 118, Constitución Nacional [Const. Nac.] (Arg.); Law No. 26.200, Jan. 5, 2007, [31069] B.O. 1 (Arg.); Código Procesal Penal de la Nación [Cód. Proc. Pen.] [Criminal Procedure Code] arts. 14-17 (Arg.); **Belgium**, Code d'Instruction Criminelle [C.I.Cr.] [Criminal Procedure Code] arts. 4 & 12bis (Belg.); **Colombia**, Código de Procedimiento Penal [C.P.P.] [Criminal Procedure Code] arts. 102-106 (Colom.);[22] Código Penal [C. Pen.] [Criminal Code] arts. 16(6), 101, 135-164, & 178 (Colom.);[23] **Costa Rica**, Código Procesal Penal [Criminal Procedure Code], *as amended*, art. 37, La Gaceta, 4 de junio de 1996 (Costa Rica);[24] Código Penal [Criminal Code], *as amended*, art. 7, La Gaceta, 15 de noviembre de 1970 (Costa Rica), *available at* http://www.tse.go.cr/pdf/normativa/codigopenal.pdf; **France**, Code de Procédure Pénal [C. Pr. Pén.] [Criminal Procedure Code] arts. 3, 689-1 & 689-2 (Fr.); **Germany**, Voelkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law], June 26, 2002, Bundesgesetzblatt,

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[22] *Available at* www.secretariasenado.gov.co/senado/basedoc/ley/2004/ley_0906_2004_pr003.html.

[23] *Available at* http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000.html.

[24] *Available at* www.tse.go.cr/pdf/normativa/codigoprocesalpenal.pdf.

Teil I [BGBl. I] 2254, § 1 (Ger.); Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl. I] 3322, as amended, § 6 (Ger.); Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1074, 1319, *as amended*, §§ 403-406 (Ger.); **Panama**, Código Procesal Penal [Criminal Procedure Code] art. 80(2), 80(7), & 122;[25] Código Penal [Criminal Code] arts. 19 & 21 (Pan.);[26] **Senegal**, Code de Procédure Pénal [C. Pr. Pén.] [Criminal Procedure Code] arts. 2 & 3 (Sen.), Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Oral Proceedings: Provisional Measures, p. 21 at ¶¶ 38-39 (Apr. 6, 2009, 3 p.m.), http://www.icj-cij.org/docket/files/144/15121.pdf (*noting that* Art. 669 of the Senegal Criminal Procedure Code allows for prosecution of international crimes committed by an alien extraterritorially); **Spain**, Ley de Enjuiciamiento Criminal [L.E. Crim.] [Code of Criminal Procedure] art. 100 (Spain); Ley Orgánica del Poder Judicial [L.O.P.J.] [Law on the Judiciary] art. 23(4) (Spain).[27]

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[25] *Available at* www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/2000/2008/2008_561_0030.pdf.

[26] *Available at* http://www.organojudicial.gob.pa/cendoj/wp-content/blogs.dir/cendoj/PENAL/textounicocodigopenalabril2010.pdf.

[27] For a country-by-country analysis of statutes allowing for extraterritorial criminal prosecution of human rights abuses, see Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011), *available at* http://www.amnesty.org/en/library/info/IOR53/004/2011/en. For an overview of the availability of civil claims for extraterritorial acts, see Amnesty Int'l, *Universal Jurisdiction: The Scope of Universal Civil Jurisdiction* (2007), *available at* http://www.amnesty.org/en/library/info/IOR53/%20008/2007.

For example, in France, torture victims brought a *partie civile* action against the perpetrator, Mauritanian intelligence officer Ely Ould Dah. He was indicted under a provision of the Criminal Code of Procedure granting French courts jurisdiction over anyone found on French territory who has committed torture extraterritorially. Following his escape from France, Dah was tried *in absentia* and in 2001 he was sentenced to 10 years in prison. *See, Ely Ould Dah v. France*, Decision on Admissibility, Eur. Ct. H.R., No. 13113/03, March 17, 2009, *available at*: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=848776&portal=hbkm&source=externalbydocnumber&tabl. In 2009, the European Court of Human Rights declared inadmissible an application lodged by Dah asserting that the French courts had improperly applied the French criminal universal jurisdiction statute to him. *Id.*

More recently, French courts accepted a petition for *partie civile*, permitting a criminal investigation into the technology firm Amesys, a French subsidiary of Bull S.A., for alleged complicity in acts of torture in Libya against Libyan civilians. *See, e.g.*, Paul Sonne & David Gauthier-Villars, *Tech Firm Amesys Faces French Judicial Probe*, Wall. St. J. (May 22, 2012), *available at:* http://online.wsj.com/article/SB10001424052702304791704577420392081640000.html.

C. Other countries permit civil claims independent of criminal proceedings.

Some States allow victims of human rights abuses to pursue independent civil claims for acts which

took place outside of the country. These include **Canada** (*see, e.g., Kazemi (Estate of) v. Islamic Republic of Iran*, 2011 QCCS 196 (CanLII), January 25, 2011, *available at:* http://canlii.ca/t/2fh0s); **the Netherlands**, Dutch Civil Law, Article 9(c), Tacit choice of forum ('forum necessitatis', granting jurisdiction where there is sufficient connection with the Dutch legal sphere and it would be unacceptable to demand that the plaintiff submit the case to a judgment of a foreign court) (*available at* http://www.dutchcivillaw.com/legislation/indexcivilproc.htm); and the **United Kingdom**, *see* Redress & Int'l Fed'n of Human Rights (FIDH), *Legal Remedies for Victims of "International Crimes" – Fostering an EU Approach to Extraterritorial Jurisdiction* 73 (2004), *available at* http://www.redress.org/downloads/publications/LegalRemediesFinal.pdf (discussing civil cases brought in UK courts for human rights abuses committed extraterritorially and dismissed under the doctrine of state immunity).

A Dutch court recently awarded $1 million euros as restitution in a civil suit for torture committed by foreign (Libyan) officials in Libya against a non-national (Palestinian) plaintiff. *Ashraf Ahmed El-Hojouj v. Harb Amer Derbal et al.*, LJN BV9748, Rechtbank 's-Gravenhage, 400882 / HA ZA 11-2252 (March 21, 2012), *available in Dutch at* http://jure.nl/bv9748; *see also Dutch court compensates Palestinian for Libya jail*, BBC News, (Mar. 28, 2012), http://www.bbc.co.uk/news/world-middle-east-17537597. French courts have awarded civil damages to victims of the Bosnian civil war. In March 2011, the

Tribunal de Grande Instance de Paris held former Bosnian Serb leaders Radovan Karadzic and Biljana Plavsic responsible for injuries suffered by a Bosnian family during the war, and ordered the defendants to compensate the family in the amount of 200,000 euros. *Kovač et al. v. Karadžic et al.*, Tribunal de Grande Instance de Paris, Judgment of March 14, 2011, No. 05/10617. England exercises extraterritorial civil jurisdiction over human rights abuses for injuries suffered within the country, which has been interpreted broadly to include "ongoing medical and psychological problems arising from the torture." Naït-Liman v. Switzerland (Application No. 51357/07), Written Comments by Redress and World Organisation Against Torture to the European Court of Human Rights (15 Sept. 2011), ¶ 25 (discussing *Al-Adsani v. Kuwait*, [1994] PIQR 236 at 239), *available at:* http://www.redress.org/downloads/Nait%20Liman%20submission%20-%20Final.pdf. Finally, Canadian courts recently allowed a civil claim to proceed against foreign (Iranian) officials regarding extraterritorial acts of torture on the basis of the acts' effect within Canada.[28]

D. There is a growing European consensus on the need to allow jurisdiction to ensure the plaintiff's right of access to a Court.

Many European countries have opened their domestic courts to victims residing within their bor-

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[28] Kazemi v. Iran [2011] Q.C.C.S 196, *available at:* http://www.redress.org/case-docket/kazemi-v-iran. (*But see:* http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CAN.Q.6.Add.1_en.pdf, ¶ 339.)

ders who do not satisfy typical jurisdictional requirements and are unable to bring the case in another forum. This jurisdictional expansion reflects the importance of the right to judicial access, protected under the European Convention on Human Rights and Fundamental Freedoms, Article 6. Two comprehensive studies of European countries, from 2007 and 2010, each report a general consensus that the nexus requirement is satisfied by some form of territorial jurisdiction, including even the mere fact that the plaintiff is domiciled or habitually resident in the forum State.[29] Austria, Belgium, Estonia, the Netherlands, Poland, and Portugal, among others, have enacted statutes to ensure this type of access.[30] Furthermore, Finland, France, Germany, Luxem-

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[29] Arnaud Nuyts, *Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations* (2007) 66, (*hereinafter* EC Residual Jurisdiction Study), *available at*: http://ec.europa.eu/civiljustice/news/docs/study_ residual_jurisdiction_en.pdf; Redress/FIDH, *Extraterritorial Jurisdiction in the European Union, A Study of the Laws and Practice in the 27 Member States of the European Union* (December, 2010), at 22-23.

[30] *See Naït-Liman v. Switzerland* (Application No. 51357/07), Written Comments by Redress and World Organisation Against Torture to the European Court of Human Rights (15 Sept. 2011), ¶ 23, n. 44, *available at* http://www.redress.org/dowloads/Nait%20Liman%20submission%20-%20Final.pdf; Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU, National Report for Netherlands, at 23 (2007), *available at* http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_netherlands_en.pdf ("The Dutch lawmakers said that principle in article 6 of the ECHR, which grants everyone the right to access to a court, was the basis for article 9(b) and (c)"); Nuyts, EC Residual

bourg, Romania, Russia, Spain, Sweden, and Turkey have each allowed their domestic court systems to establish a similar jurisdictional "hook" for plaintiffs who would otherwise have no recourse to justice.[31]

Allowing victims of human rights abuses who have no alternative forum to access the judicial system is particularly important for deterrence of torture. The Committee of Ministers of the Council of Europe has formally acknowledged the link between impunity for torture and its continuing occurrence. Guide-

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Jurisdiction Study, *supra* note 29, at 22 (noting this as the basis for the rule developed by the courts in France and Spain).

[31] *Id.*, ¶ 23, n. 46, citing the following statutes (which, unless otherwise noted, can be found in the European Commission Study on Residual Jurisdiction's country reports (hereinafter referred to as EU Country Study for 'x'), *available at* http://ec.europa.eu/civiljustice/publications/publications_en.htm, at Section 16 ('Forum necessitatis'): EU Country Study on Finland, p. 8; EU Country Study on France, p. 20; EU Country Study on Germany, p. 15, (a denial of justice cannot be allowed, but there must be a sufficient connection to Germany); Luxembourg: Tribunal d'arrondissement de Luxembourg, June 30, 1961, Pasicrisie 18, p. 372 (court recognized that it has jurisdiction when the plaintiff has no other means to preserve his/her rights); EU Country Study on Romania, p. 12; EU Country Study on Spain, p. 13; EU Country Study on Sweden, p. 9, referring to NJA 1971 p. 417, 1980, p. 188, 1985 p. 832, 1989 p. 143 and Bogdan, Michael, Svensk internationell privat- och processratt, 5th ed. pp.109-110 with further references. For Russia and Turkey see B. Ubertazzi (2011) 'Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law', 15(2) Marquette Intellectual Property Law Review 357-448 at 388.

lines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations, 1110th meeting (Mar. 30 2011), http://www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/default_EN.asp. Dismissing a plaintiff's claim in the absence of an adequate forum for prosecution undermines the important international law objective of eliminating the practice of torture.

IV. CONCLUSION

A right without a remedy is no right at all. The Alien Tort Statute provides the mechanism through which the United States complies with international law and lives up to its promises, ideals, and values. It ensures that the right of *all* people to be free from torture and other grave human rights abuses has practical meaning. States are required to prevent, prosecute and punish, and provide redress for acts of torture in order to meet their obligations under the CAT, Arts. 2 (prevention), 4-7 (punishment), and 13-14 (redress). Providing an effective civil remedy to victims of torture — wherever the abuse occurs — serves each of these goals as it compensates and rehabilitates victims, financially penalizes perpetrators, and deters future abuse by raising the cost of violations.

For these reasons, among others, this Court should continue to find the Alien Tort Statute provides a remedy for egregious human rights abuses, including torture, that are committed extraterritorially.

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